INTERIOR BOARD OF INDIAN APPEALS

Estate of Lois Marie (Francis) Pete (Sanchez)

22 IBIA 249 (08/28/1992)

Related Board case:
22 IBIA 260

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF LOIS MARIE (FRANCIS) PETE (SANCHEZ)

IBIA 92-16 Decided August 28, 1992

Appeal from orders issued by Administrative Law Judge S.N. Willett in Indian Probate IP PH 187I 90 and IP PH 123I 91 (Rehearing).

Affirmed; 9 IBIA 94, 88 I.D. 993, and 14 IBIA 106 modified in part.

1. Indian Probate: State Law: Pretermitted Heir--Indian Probate: Wills: Failure to Mention Child--Indian Probate: Wills: Failure to Mention Spouse--Indian Probate: Wills: Revocation by Subsequent Marriage

   In the absence of substantive law or regulations on the issue of pretermitted heirs, the Department of the Interior should give effect to the stated wishes of an Indian testator, as expressed in a valid will, rather than create substantive rules governing pretermission within the limited context of individual probate cases.

APPEARANCES: John C. Shevlin, Esq., Palm Springs, California, for appellant; Ernest G. Noia, Esq., Palm Springs, California, for Liza Marie Pete; Manuel Monguia, Esq., Escondido, California, for Monica Mendez and Maria Mendez.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Thomas G. Sanchez seeks review of a December 27, 1990, order approving the will of decedent Lois Marie (Francis) Pete (Sanchez), Palm Springs Allottee PS-79, and of a September 18, 1991, order granting petition for rehearing in part and denying rehearing in part. Both orders were issued by Administrative Law Judge S.N. Willett. For the reasons discussed below, the Board of Indian Appeals (Board) affirms those orders.

Because appellant's arguments raise only legal issues, the Board will recite only those facts which are necessary to an understanding of the legal arguments. Decedent executed a will on April 28, 1971. That will devised decedent's trust or restricted property to her daughter, Liza Marie Pete, and to her two sisters, Monica Mendez and Maria Mendez. Decedent and appellant were subsequently married. Decedent did not execute a new will after her marriage to appellant, and apparently made no other provision for him. In this appeal, appellant alleges that he should take part of decedent's estate either as a pretermitted heir or under a doctrine of changed circumstances. He asks the Board to overrule several prior decisions, in particular, Estate of Howard Little Charley, 18 IBIA 335 (1990); Estate of Winona June Little Hawk Garcia, 14 IBIA 106 (1986); and Estate of Ronald Richard Saubel, 9 IBIA 94, 88 I.D. 993 (1981). In Little Hawk and Saubel the Board declined to invalidate wills for the benefit of pretermitted heirs. 1/

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1/ The Board's actual holding in the Little Charley case was procedural in nature. The Board affirmed the Administrative Law Judge's holding that the appellant was barred from later attacking the decedent's will when she

On appeal appellant argues: (1) the decision in Tooahnipah v. Hickel, 397 U.S. 598 (1970), upon which the Board relied in Saubel, does not hold that regulations on pretermitted heirs are necessary for the Secretary to exercise the discretion conferred upon him by 25 U.S.C. § 373 (1988), 2/ to disapprove an Indian will on the grounds of pretermission or changed circumstances; (2) prior to the decision in Tooahnipah, and the Board's erroneous interpretation of the court's holding, the Department had a policy of disapproving Indian wills based upon pretermission, or, in the alternative, did not have a policy of not disapproving wills on that ground; (3) by holding that she was bound by prior erroneous Board decisions, the Administrative Law Judge applied, to appellant's detriment, an erroneous standard of law to his objections to admission of the will to probate; (4) the Administrative Law Judge's orders in the present estate, coupled with the Secretary's failure to promulgate regulations concerning pretermission, constitute a failure to exercise the discretion conferred upon the Secretary by 25 U.S.C. § 373, which, in the context of this case,

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fn. 1 (continued)
was given notice of the probate hearing, but failed to appear at the hearing and present her arguments at that time. No determination was made as to whether the appellant was, in fact, the decedent's daughter or a pretermitted heir.

2/ Section 373 provides in pertinent part:

"Any persons of the age of eighteen years or older having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restricted period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior."

All further references to the United States Code are to the 1988 edition.

constitutes a violation of 5 U.S.C. § 706; and (5) the Secretary is obligated to exercise the discretion conferred upon him by 25 U.S.C. § 373 to decide appellant's appeal on its merits.

[1] Appellant first argues that the decision in Tooahnipah does not prohibit the Department from disapproving an Indian will based upon pretermission or changed circumstances. The Board has carefully considered Judge Willett's exhaustive analysis of the case law developments leading up to the present state of Departmental law. Upon mature reflection, the Board agrees that its cases in the area of pretermission citing Tooahnipah have "stretched" the Court's actual holding. Despite that agreement, it declines to reverse the result it has reached in previous cases and continues to hold, as discussed further infra, that, in the absence of substantive law or regulations on the issue of pretermitted heirs, the Department should give effect to the stated wishes of an Indian testator, as expressed within a valid will, rather than fill this "gap" through the adjudicative process. The Board, therefore, declines appellant's invitation to overrule the result in Little Hawk and Saubel.

Appellant contends that the failure to provide rules concerning pretermission through the adjudicatory process constitutes a failure to exercise the discretion given to the Secretary under 25 U.S.C. § 373. The Board disagrees. The Board has determined that it would be inappropriate for the Secretary to exercise the discretion granted under section 373 to fill in this particular "gap" through the adjudicative process. Although appellant,

as well as other disappointed individuals, will disagree with this conclusion, the Board considers it to be an informed decision, based upon its expertise in Indian probate matters and made in order to avoid the greater harm that could result from making potentially far-reaching determinations concerning the way in which all pretermitted heirs should be treated within the limited context of individual probate cases. A decision on the treatment of pretermitted heirs, or regarding changed circumstances, will have extensive and unique ramifications within the Indian community, the people to whom the Department, and the Federal government, owe a trust responsibility. If such a decision is made by the Department, it is more properly made in the context of a rulemaking proceeding, during which all of the people affected would have the opportunity to voice their opinions. 3/

Appellant goes a step further in arguing that because the Department has not exercised its discretion under 25 U.S.C. § 373 through rulemaking, it must do so through adjudication, and that the failure to provide rules constitutes a violation of 5 U.S.C. § 706. He argues that "the obligation to exercise discretion conferred by statute upon an administrative agency is imposed by 5 [U.S.C.] § 706, not by the legislation which creates the agency or delineates the scope of its authority" (Opening Brief at 25). Although

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3/ As discussed more fully infra, the Indian Land Consolidation Act, 25 U.S.C. § 2206(c), grants individual Indian tribes authority to promulgate their own probate codes, which the Department would then apply. Consideration of the plight of genuinely pretermitted heirs might better be addressed within this context. The enactment of a tribal probate code, or development of a Model Uniform Indian Probate Code, would allow for the full participation which the Board considers essential in this and other areas of substantive Indian probate law. It would also allow for tribal self-determination, which is, as Judge Willett notes, the guiding principle of current Indian policy.

appellant does not state to which section of 5 U.S.C. § 706 he is referring, presumably it is subsection 1, which provides that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed."

Assuming arguendo that appellant is correct in his statement of law, the application of 5 U.S.C. § 706(1) has been examined by the Federal courts on numerous occasions. In Environmental Defense Fund v. Costle, 657 F.2d 275, 283-84 (D.C. Cir. 1981), the United States Court of Appeals for the District of Columbia Circuit stated that the standard of review for agency inaction might "consist of either of two issues: (1) whether the agency has violated its statutory mandate by failing to act * * *, or (2) whether the agency's delay in acting has been unreasonable * * *." See also additional case citations therein. The court's analysis makes it clear that the failure of an agency to take an action which an outside person believes to be necessary or proper does not automatically require a reviewing court to use section 706(1) to order the agency to take the action. Rather, the court will analyze the statutory requirement in light of the particular circumstances facing the agency.

The Board of Indian Appeals became the appellate body for Indian probate decisions in 1970, when the Office of Hearings and Appeals was created within the Department. The Board's first analysis of the question of pretermitted heirs occurred in Saubel, which was decided in October 1981. The issue has come before the Board on three subsequent occasions, including the present appeal. On January 4, 1975, prior to the Board's consideration of Saubel, the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n, became

law. This act embodied a new era of relations between the Indian people and the Federal Government, with an emphasis upon tribal sovereignty and self-determination. Under this policy, the Department has attempted to move away from what has been seen as a paternalistic attitude toward the Indian people and toward greater recognition of the rights of Indian people to determine their own destinies as members of dependent sovereign nations. Although not expressed in the Saubel decision, this new direction was a major part of the background against which that decision was made.

As briefly mentioned in note 3, supra, the Indian Land Consolidation Act, 25 U.S.C. § 2206(c), provides:

> Notwithstanding the provisions of subsection (a) of this section [concerning escheat of certain small fractional interests in Indian trust or restricted property], any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.

This section became law on October 30, 1984. The Department has interpreted the section to allow the enactment of comprehensive, substantive probate codes by individual tribes. Although to date, few tribal probate codes have been enacted, in an era of tribal self-determination and with its expertise in Indian probate - and consequent knowledge that there are many unique problems in this area of the law - the Department has refrained from promulgating regulations in a matter in which Congress has expressly stated that the tribes have authority to act. The Board does not believe that,

in making this informed decision, either it or the Department has committed error. 4/

Appellant contends that, prior to the Board's erroneous holding in Saubel, there was a Departmental policy to invalidate Indian wills for the benefit of pretermitted heirs, or on grounds of changed circumstances. The Board adopts Judge Willett's analysis of this issue:

> The Estates of Lucy Holy or Chubby Holy, RS No. 410-1/2, Probate No. 66078-31 (1932); Estate of Julia Thompson, Unallotted Nez Perce, 59174-37 (1937); Estate of Jesse Paul, Nez Perce No. 778, Probate No. 23590-26 (1938) * * *; Estate of Mary Halooks, Flathead, No. 1719-4173-38 (1938); Estate of Kosope (Richard) Maynahonah, IA-141 (1954); Estate of Oliver Maynahonah, IA-T-1 (1966) and Estate of Reuben English, IA-T-18 (1969) are advanced for the proposition that the Secretary had a pre-Tooahnipah vs. Hickel policy, a regularly exercised one, of invalidating wills on the grounds of pretermission. * * *
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> I have examined these cases and their circumstances as well as the language of 25 U.S.C. Section 373 and conclude that there is no official or formal policy regarding pretermission or regular practice of Secretarial invalidation of wills on the grounds of pretermission.
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> 25 U.S.C. Section 373 was enacted in 1910. In the eighty-one-year period since its enactment two clusters of pretermission (changed circumstances) cases are evident. The first occurred in the north-northwest sector of the United States. One may properly take official notice of the location of the Nez Perce and Flathead Indian Reservations as being in the same immediate region of the country. The Nez Perce/Flathead cases were decided during a discrete two-year period: 1937-1938. The "RS" designation in the Estate of Lucy Holy or Chubby Holy is Rosebud Sioux. It is also a northern reservation located in the State of South Dakota. It was decided five years prior to the preceding group. It could reasonably be assumed, without purporting to decide the matter,

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4/ The fact that regulations or adjudicatory standards were not created prior to the enactment of the Indian Self-Determination Act and the Indian Land Consolidation Act is now a moot issue. The matter must be addressed in terms of the present situation, which includes those acts.

> given the existence of specific probate jurisdictions, that they were the product of the same regional Examiner of Inheritance, as deciding officials in Indian probate were then called.
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> The second group of cases, both Maynahonahs and the Estate of Reuben English, cited above, are the product of the same office and the same deciding official who produced the decision overturned in Tooahnipah vs. Hickel. In fact, the Regional Solicitor applied the same "just and equitable" standard in the Estate of Oliver Maynahonah, supra, as was applied in Tooahnipah. The authoritativeness of the latter group of cases suffers because the particular deciding official viewed his discretionary authority, as Tooahnipah reveals, as very broad and as permitting the substitution of his personal opinion concerning proper testamentary dispositions for that of Indian testators.
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> At best, one sees during an eighty-one-year period two pockets of cases, the latest of which are of questionable authoritative value, and the preceding pocket, 30 years earlier, as an isolated component. I cannot by any objective standard view this circumstance as embodying or reflecting a formal or official pretermission policy or a regular practice on the part of the Secretary of the Interior. [Footnote omitted.]

(Sept. 18, 1991, Order at 18-20).

In the alternative, appellant argues that prior to Tooahnipah there was no Departmental policy of withholding protection for pretermitted heirs. The Board assumes that this argument implies that, but for the Board's erroneous interpretation of Tooahnipah, it would not have held that an Indian will should not be disapproved on the grounds of pretermission. As is evidenced by this decision, the Board could have reached the same result by other reasoning.

Appellant next argues that Judge Willett applied an erroneous standard of law to his objections to admission of the will to probate. Appellant contends that the erroneous standard of law, which worked to his detriment, was based upon the Board's erroneous prior decisions. Appellant's argument is, in essence, an attack upon the administrative law process in that he

contends an Administrative Law Judge is not bound by the decisions of an administrative appellate tribunal if those decisions are erroneous. Again, the Board adopts Judge Willett's response to this argument:

> It is not an abuse of discretion for an adjudicator to adhere to principles of stare decisis. An administrative agency has an obligation to follow, distinguish or overrule precedent. Chisholm v. Defense Logistics Agency, [656 F.2d 42 (3rd Cir. 1981)]. It is not arbitrary for an agency to be guided by its own prior exercise of judgment as reflected in recent decisions or to make successive rulings upon a matter exhibit continuity and consistency. Panhandle Eastern Pipeline Company vs. Federal Power Commission, 236 F.2d. 606, 609 (3rd Cir. 1950).
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> It is correspondingly not a failure to exercise a full range of discretion */ to recognize the binding authority of one's appellate body or to accept authoritative determinations of that body as binding upon the lower tribunal.
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> [Appellant's] real point is that he favors the analysis of the progression and development of the cases contained in the December 27, 1990 order and seeks application here of the intuitive reasoning of the Administrative Law Judge without regard for the fact that administrative discretion, in an adjudicative context, contains a "proper mix of rule and discretion." Koch, 1 Administrative Practice and Procedure, Section 1.25, p. 46 and 47. This desire ignores the fact that standard principles of administrative adjudication include adherence to precedent and the application of authoritative decisions of duly constituted appellate bodies.
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> */ "So far as inferior courts [tribunals] are concerned it is their duty to follow the latest decisions of the appellate [tribunal], regardless of whether or not there is harmony with earlier decisions of the court [tribunal] [footnote omitted]." 21 C.J.S. Courts Section 145, p. 173. [Bracketed material in original.]

(Sept. 18, 1991, Order at 9-10).

Appellant has not demonstrated that the results in Little Hawk and Saubel should be overruled. Therefore, pursuant to the authority delegated

to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Willett's December 27, 1990, and September 18, 1991, orders are affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge